RECENT CASES.

CARRIERS—COMMON CARRIERS—DRAYMEN—A concern engaged in the teaming business, hauling merchandise from depots to warehouses, and from warehouses to stores, transported merchandise in a team belonging to another concern. The merchandise disappeared. *Held:* The firm was a common carrier, being ready to do business for anyone who sought its services for compensation. Hinchliffe v. Wenig Teaming Co., 113 N. E. 707 Ill. (1916).

To constitute a common carrier it is not essential that the person or corporation undertaking such service own the means of transportation. Blakiston v. Davis, Turner & Co., 42 Pa. Sup. 390 (1910); Ingram v. Am. Forwarding Co., 162 Ill. App. 476 (1911); Kettenhoffen v. Globe Transfer Co., 127 Pac. 295 (Wash. 1912). A lighterman carrying goods for all choosing to employ him, was held a common carrier, even though he let his barges to one person for one voyage. Liver Alkali Co. v. Johnson, 20 W. R. 633 (Eng. 1872), not so with wharfingers transporting goods for their customers from ships to their warehouse, Chattock v. Bellamy, 64 Q. B. (N. S.) 251 (Eng. 1895); Consolidated Tea Co. v. Oliver's Wharf, 2 K. B. 395 (Eng. 1910); or a logging railroad only carrying for its owners, Anderson v. Smith Powers Logging Co., 139 Pac. 736 (Oregon 1914).

Where the carrier holds itself out to serve only those with whom it chooses to contract, its liability as an insurer, is of course, denied, Electric Supply Stores v. Gaywood, 100 L. T. R. 855 (Eng. 1909); Watkins v. Cottrell, 52 T. L. R. 91 (Eng. 1915); so in the case of furniture removers, Meisner v. Ferry Co., 118 N. W. 14 (Mich. 1908); ferrying company, operating boat to its own pleasure ground, Leader v. Rys. Co., 58 Pittsb. L. J. (Pa. 1910); street railway carrying newspapers for certain publishers, but see Lloyd v. Haugh, 223 Pa. 148 (1909), where a storage concern holding itself out to the public as engaged in the general moving of household goods, although it discriminated as to persons whom it would serve, was held a common carrier.

"Jitney" busses are classed as common carriers and, as such, liable to municipal regulations, Dresser v. City of Wichita, 153 Pac. 1194 (Kansas 1916); Huston v. City of Des Moines, 156 N. W. 883 (Iowa 1916); Memphis v. State, 179 S. W. 631 (Tenn. 1915); also taxicabs, Donnelly v. P. & R. Ry. Co., 53 Pa. Sup. 78 (1913); Brown Shoe Co. v. Hardin, 87 S. E. 1014 (W. Va. 1916); Carlton v. Boudar, 88 S. E. 174 (Va. 1916), and even the operator of an incline for hire, transporting the goods of all vessels plying the river to the railroad cars, has been held within the rule, Joest v. Clarendon Packet Co., 183 S. W. 759 (Ark. 1916).

Since a common carrier must be a bailee as to goods transported an express company acting as agent for the owner in arranging for the transportation or storage of goods without having possession of, or transporting them, is not liable as a common carrier, Tilles v. American Express Co., 186 S. W. 1102 (Miss. 1916). It has been held otherwise where a forwarding company has goods hauled by its hired truckman to the railroad,

Blakeston v. Davies, *supra*. So where cars are leased to the railroads, the lessor was not a common carrier, Ellis v. I. C. C., 237 N. S. 434 (1914); but see Shaw v. K. C. Stockyards Co., 145 Pac. 832 (Kan. 1915), where a stockyards company charging railroad companies for each car moved over its tracks was held a common carrier. A transferman's duty as a carrier ends with delivery of the goods intrusted to him at the place of destination. Brown Shoe v. Hardin, *supra*, but where a custom to receive baggage destined for morning trains the night before, prevailed, the railroad received the baggage *qua* carrier and not as warehouseman. Crist v. D., L. & W. R. R., 17 Lack. J. 19 (Pa. 1916).

CONTRACTS—IMPOSSIBILITY OF PERFORMANCE AS EXCUSE—Two persons entered into a contract whereby one agreed to furnish the other's cattle with plenty of good grass during the grazing season. He failed to do so due to the most severe drought which had been known in that part of the state. *Held:* The unprecedented drought, an act of God, did not absolve him from his liability to furnish the grass. Berg v. Erickson, 234 Fed. 817 (Kan. 1916).

The principal case is in accord with the general rule that one who makes a positive agreement to do a lawful act is not absolved from liability for a failure to fulfill his covenant by a subsequent impossibility of performance caused by an act of God. Paradine v. Jayne, Allyn 26 (Eng. 1655), was the initial case on the subject and it has been followed almost unanimously in this country. Summers v. Hubbard & Co., 153 Ill. 102 (1894); Link Belt Engineering Co. v. United States, 142 Fed. 243 (Pa. 1905). But where it clearly appears that the parties to the contract must have known when they made it that its performance would be impossible unless a thing then in existence should exist at the time of the performance, then many authorities allow the obligor to be absolved from liability for his failure to perform. Stewart v. Stone, 127 N. Y. 500 (1891); Ontario Fruit Growers Ass'n v. Packing Co., 134 Cal. 21 (1901); Krause v. Board of Trustees, 162 Ind. 278 (1903). Whether or not the obligor is absolved from his liability for non-performance if his performance is rendered impossible by an act of God depends upon the true construction of the contract. The rule declared by the Supreme Court is that where one at the time of making his contract must have known or could have reasonably anticipated the possible happening of the event causing the impossibility of performance, and notwithstanding he unqualifiedly undertakes to perform, he must do so, or pay the damages resulting from his failure so to do. Chicago Ry. Co. v. Hoyt, 149 U. S. 1 (1892); United States v. Gleason, 20 Sup. Ct. 228 (1900).

Where an ambiguity or uncertainty arises in the contract which cannot be removed by an examination of the agreement alone, parol evidence of the circumstances under which it was made may be admitted to prove the real intention of the parties. Proctor v. Hartigan, 139 Mass. 554 (1885); Kilby Mfg. Co. v. Fire Proofing Co., 132 Fed. 957 (Col. 1904). For other variations in principles affecting this subject, see 64 UNIVERSITY OF PENNSYLVANIA LAW REVIEW, p. 208.

CRIMINAL LAW—EVIDENCE—CONFESSIONS—PROMISE OF IMMUNITY—A prisoner in the custody of an officer confessed to a crime after a promise of immunity if he would agree to testify at other trials. *Held:* His confession was involuntary and inadmissible. People v. Buckminster, 113 N. E. 713 (Ill. 1916).

The authorities in England and this country are unanimous in holding that a confession not freely and voluntarily made cannot be admitted in evidence. Rex v. Thompson, 2 Q. B. 17 (Eng. 1893); Collins v. Com., 25 S. W. 743 (Ky. 1894); Draughn v. State, 25 So. 153 (Miss. 1899). But the fact that the accused was under arrest at the time of confessing is not of itself sufficient to exclude the confession. Sparf v. United States, 150 U. S. 51 (Sup. Ct. 1894); Hathaway v. Com., 825 W. 400 (Ky. 1904). Confessions obtained by violence or under threat of mob violence are clearly inadmissible, Whitly v. State, 78 Miss. 255 (1900); Edmonson v. State, 72 Ark. 585 (1904), or when made to a jailor or prosecuting officer upon threat of severe punishment or promise of pardon. Roesel v. State, 62 N. J. L. 216 (1898); McMaster v. State, 34 So. 156 (Miss. 1903). Advice that the accused "had better tell the truth" has been held to vitiate the confession. Rex v. Thompson, *supra;* Hardin v. State, 66 Ark. 53 (1898).

Although confessions obtained under pressure are inadmissible, yet the facts discovered in consequence of them *are* universally admissible. Rex v. Gould, 9 C. & P. 364 (Eng. 1840); Laros v. Com., 84 Pa. 202 (1877). (For other cases on the subject, see 63 UNIVERSITY OF PENNSYLVANIA LAW REVIEW, p. 570.)

CRIMINAL LAW—FALSE IMPERSONATION—UNITED STATES STATUTES—Prisoner represented himself to be a certain member of the House of Representatives to obtain money thereby. *Held:* False impersonation of a member of Congress is a crime under a statute declaring it to be criminal to "falsely assume or pretend to be an officer or employee acting under the authority of the United States," Lamar v. United States, 36 Sup. Ct. Rep. 535 (1915).

There is little authority to be found in regard to this case. One case expressly declares a member of Congress to be a public officer, People *ex rel.* Kelly v. Common Council of the City of Brooklyn, 77 N. Y. 503 (1881); and a state senator in State v. Clendenin, 24 Ark. 78 (1862); a member of the state legislature in People v. Provinnes, 34 Cal. 520 (1868); Scott v. Strobach, 49 Ala. 477 (1873); were held to be public officers. In "Blount's Case," Wharton St. Tr. 200 (1797), however, it was held that a United States Senator is not such a public officer as to be liable for impeachment.

Authority is in accord on the construction rule laid down that even a penal statute "is not to be narrowed by construction so as to fail to give full effect to its plain terms as made manifest by its text and context," U. S. v. Hartwell, 6 Wall. 385 (U. S. Sup. Ct. 1867); U. S. v. Corbett, 215 U. S. 233 (1909).

Under this rule of construction the principal case holds that it is immaterial whether or not the act personated would have been an authorized act if done by the officer personated. This is seemingly in conflict with U. S. v. Taylor, 108 Fed. 621 (1900); U. S. v. Ballard, 118 Fed. 757 (1902).

CRIMINAL LAW—FORMER JEOPARDY—Following a conviction of assault and battery and sentence by a justice of the peace, a party being subsequently indicted for an assault with intent to rape based on the same acts, pleaded former jeopardy. *Held:* The justice had no jurisdiction to try this graver offense; therefore, the accused could not have been in jeopardy and the plea was bad. Crowley v. State, 113 N. E. 658 (Ohio 1916).

It would seem that this decision is not supported by the weight of authority. The majority of courts hold the test to determine the validity of a plea of *autrefois acquit* or *autrefois convict* is to determine whether the evidence which supported the former conviction will support the present. U. S. v. Nickerson, 17 How. 204 (1854); Com. v. Fredericks, 155 Mass. 455 (1893); Floyd v. State, 80 Ark. 94 (1906). It is generally held that one who has been tried for a crime less in degree than the offense for which he is indicted may successfully plead former jeopardy. Commonwealth v. Morgan, 9 Kulp 573 (Pa. 1900); People v. Tong, 155 Cal. 579 (1909). Assault being a necessary element in many attempts to commit felonies, it would follow logically that a conviction or acquittal on the charge of assault and battery would bar a subsequent prosecution for the graver crime founded on the assault; and so it has been held. People v. McDaniels, 137 Cal. 192 (1902); State v. Belvins, 134 Ala. 213 (1901). This has been followed, *contra* to the principal case, where the justice who tried the assault had no jurisdiction over the greater offense. People v. Purcell, 16 N. Y. S. 199 (1891); Storrs v. State, 129 Ala. 101 (1900); State v. Simpson, 138 N. W. 473 (Iowa 1912). In People v. Purcell, *supra,* the facts were the same as in the principle case. In speaking of the first trial in the justice court, the court said: "It was a court of competent jurisdiction to determine the guilt of defendant upon the accusation then made against him . . . he is entitled to protection from the second jeopardy." This latter decision overruled a former New York decision on the same point. People v. Saunders, 4 Park Crim. Rep. 196 (N. Y. 1859).

The rule as laid down by the principal case is not without authority, however. State v. Hattabough, 66 Ind. 223 (1879); Boswell v. State, 20 Fla. 869 (1884). It is well settled that if the justice had no jurisdiction to try the lesser charge the plea of former jeopardy will not be upheld. Brown v. The State, 120 Ala. 378 (1898); Gibson v. The State, 47 Tex. Crim. Rep. 489 (1904).

CRIMINAL LAW—INTOXICATING LIQUORS—CLUB LOCKERS—It is not within the scope of the police power of a town or state to prohibit members of a club from keeping intoxicating liquors for their own use in their lockers. Courtland v. Larson, 113 N. E. 51 (Ill. 1916).

Police power as defined by Justice Holmes, "extends to all the great public needs, what prevailing opinion deems immediately necessary and essential to the public welfare." Noble Bank v. Haskell, 219 U. S. 104 (1910). In the exercise of which, it has been held, a legislature may entirely prohibit the manufacture or sale of intoxicating liquors, as inimical to public health, morals, or safety. State v. Williams, 146 N. C. 618 (1908). But a statute which prohibits persons from keeping liquors solely for their

own use is unconstitutional, and therefore void. State v. Gilman, 33 W. Va. 146 (1889); State v. White, 71 Kan. 356 (1905); Partridge v. State, 114 S. W. 215 (Ark. 1908), because spirits and distilled liquors are universally admitted to be subjects of ownership and property, and by the Constitution there can be no taking of property without due process of law. State v. Young, 237 Ill. 196 (1908); Eidge v. City of Bessemer, 164 Ala. 599 (1910). Yet a club or association must not be used as a means to evade the provisions of an ordinance, statute, or local option law, relative to the use of intoxicating liquors. Comm. v. Campbell, 133 Ky. 50 (1909); City of Decatur v. Schlick, 269 Ill. 181 (1915). Possession of intoxicants is not *per se* unlawful, without proof of intent to dispose of them in violation of a governing act. Tilsworth v. State, 101 Pac. 288 (Okla. 1909). The statutes of some states are so framed that it is a punishable offense to have liquor in one's possession, though intended solely for his own consumption, if certain conditions are not complied with. Bice v. State, 109 Ga. 117 (1900); Easley v. Pegg, 63 S. C. 98 (1901). Yet such a statute has been held not to apply to facts almost identical to those of the principal case. Donald v. Scott, 76 Fed. 554 (S. C. 1895).

There are a few courts that hold that; although a property right in intoxicating liquors is recognized by the law, yet such a statute is constitutional, and a valid exercise of a state's police power. Town of Selma v. Brewer, 98 Pac. 61 (Cal. 1909); State v. Phillips, 67 So. 651 (Miss. 1915).

EVIDENCE—PAROLE PROMISE INDICATING THE EXECUTION OF A WRITTEN CONTRACT—A parole stipulation upon the faith of which the writing in suit was executed was offered to vary the written agreement. *Held:* Such evidence was admissible. Excelsior Saving Fund & Loan Soc. v. Fox, 98 Atl. 593 (Pa. 1916).

The principal case follows the long line of Pennsylvania authorities enunciating the peculiar doctrine of this state. Kostenbater v. Peters, 80 Pa. 438 (1876); Haney v. Moorehead, 61 Super. 187 (Pa. 1916), where the breach of the oral inducing contract is held to be a fraud on contractor's rights, Gandy v. Weckerly, 220 Pa. 285 (1908). All the other jurisdictions, however, hold that a contract in writing, complete on its face, cannot be varied by a parole agreement, Iron Works v. Wagner, 154 Pac. 460 (Wash. 1916), even though the oral stipulation was the inducement for entering into written agreement. Reed v. Moore, 154 Pac. 348 (Okla. 1916). Even in Pennsylvania it must be alleged and proven that the oral agreement was the inducement, and statements and circumstances leading up to the execution are not admissible. Sutcliffe v. Bakes, 62 Super. 65 (Pa. 1916). And where a paragraph in the written contract makes all previous communications inconsistent therewith void, a parole contemporaneous agreement is inadmissible. Trouter Mfg. Co. v. Blaney, 61 Super. 374 (Pa. 1916); Steamship Co. v. Pechin, 61 Super. 401 (Pa. 1916). A parole agreement not contemporaneous and not omitted by fraud or mistake is not competent to vary a written contract of the parties, Lowry v. Ry., 238 Pa. 9 (1913). The uncorroborated testimony of the offeror is not sufficient to prove an oral contemporaneous agreement, Armour v. Express Co., 52 Super. 329 (Pa. 1913).

The rule of admissibility has not been extended to cover cases of instruments under seal. Wodock v. Robinson, 148 Pa. 503 (1893), especially where the deed is complete on its face and not ambiguous, Hollis v. Hollis, 8 Berks 85 (Pa. 1916); and even in ordinary contracts the Supreme Court has shown a tendency to favor a return to the English rule, Dixon v. Glass Co., 169 Pa. 167 (1895); Fuller v. Law, 207 Pa. 101 (1903). But the cases expressing such a feeling have not been extended as exemplified by the principal case. This is especially true of the Superior Court. Haney v. Moorehead, 61 Super. 187 (Pa. 1916); Chesney v. Guernsey, 61 Super. 490 (Pa. 1916).

FRAUD—RECKLESS STATEMENTS—Peek *v.* Derry—The vendor of a small tract of land misrepresented the number of acres therein, though he honestly believed his statements. *Held:* Where a vendor makes a false representation of a material fact, susceptible of knowledge and relating to a matter in which he has an interest, and of which he might be expected to have knowledge, and makes such unqualifiedly as of his own knowledge, with intent to induce action, he cannot plead his honest belief in its truth. Schlechter v. Felton, 158 N. W. 813 (Minn. 1916).

This case is directly contrary to the doctrine of the leading case of Peek v. Derry, 14 Appeal Cases, 337 (1889), that there must be actual fraud and not mere gross negligence; that an honest belief in the truth of the statement is a good defense.

The vendee must prove *scienter* on the part of the defendant, *i. e.,* that the defendant knew the statements were false or had the equivalent of such knowledge, Griswold v. Gebbie, 126 Pa. 353 (1889; Colorado Springs Co. v. Wright. 44 Colo. 179 (1908); Snyder v. Stemmons, 151 Mo. App. 156 (1910). This *scienter* may be proved by showing that the assertion was made as of the defendant's own knowledge so unqualifiedly that it is implied that he had actual knowledge, Cabot v. Christie, 42 Vt. 121 (1869); Watson v. Jones, 41 Fla. 241 (1889), though in Pennsylvania, where a distinction is drawn between fraud and evidence of fraud, recklessness is only *prima facie* evidence of deceit, Griswold v. Gebbie, *supra.* If it was his duty to know, the conclusion that he did know is irresistible. Watson v. Jones, *supra.* One negotiating a trade is bound to know, and cannot assert to be true that which he does not know to be true. Prestwood v. Carlton, 162 Ala. 327 (1909); Katham v. Comstock, 140 Wis. 427 (1909). It has been held that he cannot by his recklessness cast upon the vendee the duty of measuring the land, but that the latter may rely on the former's statements. Ledbetter v. Davis, 121 Ind. 119 (1889); Westerman v. Corder, 86 Kan. 239 (1912). In most states the vendor, who has misrepresented the number of acres in a tract, is liable, even though he has pointed out to the vendee the boundaries, Ledbetter v. Davis, *supra;* Griswold v. Gebbie, *supra,* though Massachusetts holds that the duty of inspection rests upon the vendee. Gordon v. Parmelee, 2 Allen 212 (Mass. 1861). It has been held that a *scienter* need not be proved, and that the defendant, if a party to the contract, is liable, even though the representation is innocent. Aldrich v. Scribner, 154 Mich. 23 (1908).

HUSBAND AND WIFE—LIABILITY FOR NECESSARIES WHEN MARRIAGE IS VOID—A man, who had gone through the form of marriage with a woman, despite her having a husband then living, who had lived with her and had held her out as his wife, was sued by a tradesman for the price of necessaries bought by his alleged wife, on his credit. *Held:* That for the purpose of the present action, his *status* was the same as if the marriage had been legal. Frank v. Carter, 113 N. E. 549 (N. Y. 1916).

The general rule is that when a wife purchases necessaries on her husband's credit, the law presumes that she does so with his authority. Bergh v. Warner, 47 Minn. 250 (1891). The presumption is *prima facie* only, and may be rebutted by proof that the husband notified the tradesman not to sell to his wife on his credit, Hibler v. Thomas, 99 Ill. App. 355 (1901), or that he made suitable provision for his wife, either by furnishing her with an adequate allowance, Wanamaker v. Weaver, 176 N. Y. 75 (1903), or by supplying the necessaries himself. Cromwell v. Benjamin, 41 Barb. 558 (N. Y. 1863).

The basis of this presumptive agency, on the part of the wife, arises from the fact of cohabitation and the presumption is so strong that if a man cohabits with a woman, holding her out to be his wife, he is liable for goods furnished to her, during their cohabitation, even toward a tradesman who knew they were not married. Watson v. Threlkeld, 2 Esp. 637 (Eng. 1798); Ryan v. Sams, 12 Q. B. 460 (Eng. 1848). *A fortiori,* this would be the case, where, as in the principal case, the tradesman supposed them to be married and there had been a marriage in fact, but which marriage was void. Blades v. Free, 9 B. & C. 167 (Eng. 1829); Johnstone v. Allen, 6 Abbot's Practice, N. S., 306 (N. Y. 1869). The husband is estopped to set up bigamy as a defense to the action, Robinson v. Nahon, 1 Camp. 245 (Eng. 1808), even though the parties have separated, provided the supposed husband has not made any provision for his wife's support. Johnstone v. Allen, *supra.* It has been held, however, that where no marriage has in fact taken place, the separation of the parties relieves the husband, so called, from liability for goods furnished after that incident. Munro v. DeChemant, 4 Camp. 215 (Eng. 1815); Johnstone v. Allen, *supra.*

LANDLORD AND TENANT—COVENANT FOR QUIET ENJOYMENT—A landlord after giving a tenant a covenant for quiet enjoyment leased the adjoining premises as an auction room. The auctions being conducted in such a manner as to injure the tenant's business, the latter thereupon sued on the covenant. *Held:* The landlord had not authorized or actively participated in the nuisance, and therefore was not liable, either for breach of covenant for quiet enjoyment, or derogation from grant. Malzy v. Eicholz, 115 L. T. 9 (Eng. 1916).

The general rule is that the landlord must take an active part in the act complained of, to be liable. Jaeger v. Mansions, Limited, 87 L. T. Rep. 690 (1903). He is liable only for his own acts and the acts of those claiming title paramount to the tenant, Williams v. Gabriel, 1 K. B. 155 (Eng. 1906); Georgeous v. Lewis, 128 Pac. 768 (Cal. 1912); Cohen v. Hayden, 157 N. W. 217 (Iowa 1916); but not for the acts of third persons. Talbott

v. English, 156 Ind. 299 (1900). It is now settled in England that in the absence of an express covenant for quiet enjoyment, one will be implied from the mere relation of landlord and tenant. Budd-Scott v. Daniel, 2 K. B. 351 (1903). There are decisions in this country in accord with that view. Greer v. Boston Little Circle Zinc Co., 103 S. W. 151 (Mo. 1907). Some courts, however, refuse to imply the covenant in the absence of the words "demise" or "grant," Lovering v. Lovering, 13 N. H. 517 (1843); Mershon v. Williams, 63 N. J. L. 398 (1899); while others hold any words of leasing are sufficient to raise the implication. Maule v. Ashmead, 20 Pa. 482 (1853); Hamilton v. Wright's Admin., 28 Mo. 199 (1859). It has been held in England that any interference by a landlord with the tenant's expected use of the premises is a breach of the covenant for quiet enjoyment, Tebb v. Cave, 1 Ch. 642 (1900), and also a derogation from the grant of the landlord. Grosvenor Hotel Co. v. Hamilton, 2 Q. B. 836 (1894). The court in the principal case holds that there must be some obligation imposed by the grant, and an active participation in an act questioning the tenant's right, by the landlord, in order to make him liable for a derogation from grant.

MASTER AND SERVANT—FOREMAN—WHEN VICE PRINCIPAL AND WHEN FELLOW SERVANT—Foreman A was killed by negligence of foreman B in adjusting a machine near where A was rightfully standing. *Held:* When a foreman is discharging duties imposed by reason of his superior position, he is vice principal, and the master is liable for his negligence. Anderson v. Keystone Type Foundry Co., 98 Atl. 696 (Pa. 1916).

The test of the master's liability is not the rank of the servant, B. & O. R. R. Co. v. Baugh, 149 U. S. 368 (1893); nor the superior control, Northern Pacific R. R. Co. v. Peterson, 162 U. S. 346 (1896); nor the place or machinery, R. R. v. Barker, 169 Ind. 670 (1908); but the character of the negligent act which caused the injury. Northern Pacific R. R. Co. v. Peterson, *supra;* R. R. v. Barker, *supra.* But some courts cling to the older and contrary rule that one upon whom rests a duty to obey is a servant, Railway Co. v. Wrenn, 50 S. W. 210 (Tex. 1899); or conversely that power to manage a business and employ and discharge servants make a man a vice principal. Shumway v. Manufacturing Co., 98 Mich. 411 (1894).

According to the better rule, a mere servant becomes a vice principal with respect to a fellow servant, when he is performing a duty owed by the master to that servant, Mercer v. R. R. Co., 154 N. C. 399 (1911); and a foreman performing mere business details which the master may assign is reduced to the rank of a fellow servant. Iron Co. v. La Bianca, 106 Va. 83 (1906). Hence there arises the "dual capacity" doctrine which holds the master liable for negligence of the vice principal acting as such, Railroad Co. v. Atwell, 198 Ill. 200 (1902), though not liable when the vice principal is acting as fellow servant. Reeser v. Electric Co., 246 Pa. 24 (1914). Some jurisdictions reject this doctrine. Stone v. Kraft, 31 Ohio 287 (1877). Once a vice principal, always a vice principal. Shumway v. Mfg. Co., *supra.* But an employee cannot be a vice principal and a fellow servant at the same time. If there is a doubt, it will be held to have been done

in the capacity in which it was his special duty to act, though the nature of the act may be considered in determining the character in which he was acting. R. R. Co. v. Baldwin, 113 Tenn. 409 (1904). Generally a master is liable for the acts or negligence of independent contractors, if the master trusts to them duties which he himself owes, Ortlip v. Traction Co., 198 Pa. 586 (1901); though there are a very few cases *contra,* Devlin v. Smith, 89 N. Y. 470 (1882).

MASTER AND SERVANT—WHAT CONSTITUTES RELATION—A servant was negligently injured while riding in his employer's car from his place of employment to the boarding-camp, his carriage being in pursuance of his contract of employment. *Held:* The servant was a passenger and the "fellow servant" rule did not apply. Williams v. Union Switch & Signal Co., 158 N. W. 901 (S. D. 1916).

The exact relation of a servant to his master while riding in vehicles operated by other servants of the master is a question on which the courts are not in harmony. Generally, when the servant is riding in the course of, or as part of, his employment, the relation of master and servant continues. Hando v. Loudon, *etc.*, Ry. Co., L. R. 2 Q. B. 439 N. (1867); Louisville & Nashville R. R. Co. v. Stuber, 108 Fed. 934 (1901). Some courts, however, hold that even here, the relation is that of carrier and passenger. Carswell v. Macon, *etc.*, R. R. Co., 118 Ga. 826 (1903); Haas v. St. Louis Ry. Co., 111 Mo. App. 706 (1905).

Where the servant is being transported to or from his work, the transportation being furnished gratuitously, it has been held he is a fellow-servant of those operating the vehicle. Tumney v. Midland Ry. Co., L. R. 1 C. P. 291 (1866); Chicago, *etc.*, R. R. Co. v. O'Donnell, 114 Ill. App. 345 (1904); St. Bernard Cypress Co. v. Johnson, 222 Fed. 246 (1915). But there is authority which regards him as a passenger. Dickenson v. West End St. Ry., 177 Mass. 365 (1901); Harris v. R. R. Co., 69 W. Va. 65 (1911).

On the other hand, where the transportation is furnished in part consideration for services, the general rule, like that in the principal case, is that the relation is that of carrier and passenger. Hebert v. Portland R. R. Co., 103 Me. 315 (1907); Harris v. Puget Sound Ry., 52 Wash. 289 (1909); Elmer v. Pittsburgh Rys. Co., 251 Pa. St. 505 (1916). And also, when he is riding for purposes of his own, the same relation exists, regardless of whether or not the transportation is furnished gratuitously. Davis v. Chicago, St. P., M. & O. R. Co., 45 Fed. 543 (1891).

NEGLIGENCE—CARRIER—LIABILITY TO ALLEGED PASSENGER—A boy, ten years old, invited by the motorman of a street car to ride on the front platform, free of charge, was injured by the motorman's negligent operation of the car. *Held:* The company owed him the same duty as it owed a passenger. Hayes v. Dampsell, 113 N. E. 611 (Ill. 1916).

The decision of the principal case is in accord with the settled rule of law. Solomon v. Public Service Ry. Co., 87 N. J. L. 284 (1914). Children of immature years, who innocently accept the invitation of a motorman or conductor to ride free of charge are passengers and entitled to the rights

of passengers. Little Rock Traction and Elec. Co. v. Nelson, 66 Ark. 494 (1899). The fact that the agent acted contrary to his instructions is immaterial. The act was one within the general scope of his authority. Wilton v. Middlesex R. Co., 107 Mass. 108 (1871).

While there are *dicta* to the effect that a different rule prevails in the case of an adult (see Danbeck v. New Jersey Traction Co., 57 N. J. L. 463, and Hayes v. Sampsell, *supra*); still it has been held that if there is no collusion on his part with the agent to defraud the company, he is not deprived of his rights as a passenger. L. & N. R. R. Co. v. Scott's Adm'r, 108 Ky. 392 (1900). But where, however, a person attempts, in bad faith, to defraud the carrier by riding free, even though with the consent of the conductor, he is a trespasser, to whom the only duty of the carrier is to abstain from wilful or reckless injury. Purple v. Union Pac. Ry. Co., 114 Fed. 123 (1902); Kruse v. St. Louis I. M. & S. Ry. Co., 133 S. W. 841 (Ark. 1911).

If, however, the carrier itself, or a person having full authority to do so, invites a party to ride free, he is then carried lawfully as a passenger and entitled to all the care which the law requires of the passenger carrier, Phila. and Reading R. R. Co. v. Derby, 14 How. 468 (1852). So a party riding on a free pass is a passenger, G. C. & S. F. Ry. Co. v. McGown, 65 Tex. 640 (1886).

PARTNERSHIP—CONTRACTS OF ONE PARTNER—LIABILITY—A member of a partnership engaged in the manufacture of corsets, purchased notion novelties in the firm name but for use in a store which he owned and conducted individually. After notice the other partner offered to persuade his copartner to pay for the goods out of his own funds. *Held:* The partnership was not bound originally nor by ratification. Samstay v. Ortheimer, 97 Atl. 865 (Conn. 1916).

Each member of a partnership is, in contemplation of law, a general agent of the firm and may bind it by acts done within the scope of the partnership business. Saving Fund Soc. v. Bank, 36 Pa. 498 (1860); Davis v. Richards, 45 Miss. 499 (1871). Even though as between the partners the act may be fraudulent, Capelle v. Hunt, Federal Cas. 2391 (1875). The right is founded, not by the terms of the appointment, but by the nature of the partnership agreement and relations, Hoge v. Rush, 173 Pa. 264 (1896). In general the language of the agreement and the ordinary usages of the business in which the firm is engaged determine the scope of the partnership business, Clark v. R. Co., 136 Pa. St. 408 (1890); but it has been held, too, that the nature of the business conducted by the particular firm determines the scope of the authority, Fertilizer Co. v. Reynolds, 79 Ala. 497 (1895); Crane Co. v. Tierney, 175 Ill. 79 (1898). When, however, the act done is without the scope of the partnership business, the intendment of the law is that the partner deals with the third person on his private account, notwithstanding the use of the partnership name, and the firm is not bound. Sutton v. Irwine, 12 S. & R. (Pa. 1824).

But the adoption by the firm of an unauthorized act of a partner will make it liable therefor, Howe v. McVay, 1 W. N. C. 46 (Pa. 1874). To

hold a partnership liable on an alleged ratification of an unauthorized act of a member, the partnership must assent to the precise provisions of that contract, Robert's Appeal, 92 Pa. 407 (1880), and the burden of proving such ratification is on him who seeks to establish it. McNeils Exec. v. Reynolds, 9 Ala. 313 (1846).

PROPERTY—RESTRICTIVE COVENANT—SINGLE DWELLING—OR FLAT—According to a covenant in a deed of conveyance, the grantee agreed not to build any building "except a single detached dwelling house." *Held:* This covenant permits the erection of a flat building. Voorhees v. Blum, 113 N. E. 593 (Ill. 1916).

Restrictive covenants in deeds are not favored by the courts and any doubt as to the intention of the parties is to be resolved against the grantor, Sonn v. Heilberg, 38 App. Div. 515 (N. Y. 1899). In ascertaining the intention, the content of the instrument, the attendant circumstances, and the situation of the parties are all to be considered. Skillman v. Smathehirst, 57 N. J. Eq. 1 (1898); Saunders v. Dixon, 114 Mo. App. 229 (1905). These rules are universally recognized and adherence to them explains the various interpretations put on words apparently of similar meaning. So it has been held a covenant against occupation of premises "except for one dwelling house" was held to prohibit the erection of a two-story flat house, Harris v. Rorabach, 137 Mich. 292 (1904), while a covenant that "nothing but a dwelling house shall ever be erected" was held to permit the erection of a flat or apartment house. Johnson v. Jones, 244 Pa. 386 (1914). A covenant against any building except "dwelling houses" is not violated by the erection of apartments. Bates v. Togeling, 137 App. Div. 578, or tenements, Roth v. Jung, 79 App. Div. 1 (N. Y. 1903). But a covenant that only one single dwelling should be erected is broken by the erection of apartments, Gillis v. Bailey, 17 N. H. 18 (1845), though in Hutchinson v. Ulrich, 145 Ill. 336 (1893), on the authority of which the principal case was decided, an exactly opposite interpretation was given to identical words.

A covenant merely against the erection of more than one house is not violated by building a flat house. Kimber v. Admans, 60 L. J. Ch., N. S., 296 (1900); Pank v. Eaton, 115 Mo. App. 171 (1905); but it does forbid a stable, Schwenck v. Campbell, 11 Abb. Prac. 292 (N. Y. 1860). And generally a covenant not to erect a tenement house, is not broken by the erection of a high-class apartment house, Ranger v. Lee, 66 Misc. Rep. 144 (N. Y. 1910).

This subject is fully discussed in an able note in 45 L. R. A. (N. S.), 726.

SALES—BILL OF LADING—DELIVERY TO CARRIER—A sight draft drawn on the agent of the vendor was attached to the bill of lading, naming subvendee as consignee. Consignee by contract released the carrier on delivery of the goods at their siding. *Held:* Title to the goods passed to consignee upon their delivery to the carrier. Cotton Oil Co. v. Matheson, 89 S. E. 478 (S. C. 1916).

A bill of lading is the symbol of the property described therein and its indorsement by consignor passes title. Supply Co. v. McInturff, 179

S. W. 999 (Ark. 1916); Ry. v. Mounts, 144 Pac. 1036 (Okla. 1915). Delivery to carrier and taking of the bill of lading in the name of the vendee, as in the principal case, passes title to the goods, Bacharach v. Freight Line, 133 Pa. 414 (1890); and a delivery thereunder without the bill of lading would relieve the carrier, irrespective of any agreement between the parties, Bank v. Elliot, 86 N. W. 454 (Minn. 1901). As between the contracting parties, however, the intention of the parties governs and this is expressed by the terms of the paper. Emery v. Bank, 18 Am. Rep. 299 (Ohio 1874). Taking out the bill of lading in the name of the vendor is *prima facie* evidence of an intent to reserve the title, Armstrong v. Coyne, 67 Pac. 537 (Kan. 1902), and this is strengthened by the fact that a sight draft on the vendee is attached to such a bill of lading. Dows v. Bank, 91 U. S. 618 (1875); Storage Co. v. Ry., 222 Mass. 535 (1916). In such a case a vendor may by discounting the draft with a bill of lading pass good title. Bank v. Isenberg, 59 Super. 162 (Pa. 1916). On the other hand, taking out the bill of lading in the name of vendee is evidence of an intent to pass title. Bank v. Elliot, 86 N. W. 454 (Minn. 1901). But if a sight draft on vendee is attached title does not pass, Bank v. Hartzell, 55 Sup. 56 (Pa. 1914), and a discount of the draft and transfer of the bill of lading passes a special property to the goods, which, however, passes to vendee upon tender of the purchase price, Mirabita v. Bank, L. R. 3 Excheq. Div. 164 (Eng. 1878); or becomes absolute in the discounting bank upon the refusal of vendee to pay, *Ex parte* Hood, 67 So. 1017 (Ala. 1915).

By statute, some states have made bills of lading negotiable, Pennsylvania, Act of September 24, 1866, P. L. 1363 (1867); Code of Virginia, edition of 1860, p. 620; but that does not give them all the incidents usually given to "law merchant" negotiable papers, Shaw v. P. R. R., 101 U. S. 557 (1879), though the negotiation of a bill of lading to a *bona-fide* purchaser for value will defeat vendor's right of stoppage *in transitu,* Lukbarrow v. Mason, 6 East 20 (Eng. 1793).

SALES—RESCISSION—DUTY TO RETURN—In an action by the vendee to recover the purchase price paid for a silo, alleging failure on vendor's part to supply the missing parts, the latter raised as a defense the vendee's failure to return the silo. *Held:* The refusal of the vendor to accept the silo relieved the vendee of his obligation to return it. Lake v. Western Silo Co., 158 N. W. 673 (Iowa 1916).

Generally, if a buyer rescinds a contract of sale he must return, or offer to return, all that he has received under the contract, to the place where he received it. National Improvement and Construction Co. v. Maiken, 103 Iowa 118 (1897); Allaire, Woodward & Co. v. Cole, 187 S. W. 816 (Mo. 1916). However, the buyer need not return, or offer to return, the subject-matter of the sale where the vendor refuses to accept it. Milliken v. Skillings, 89 Me. 180 (1896); Jones v. McGinn, 104 Pac. 994 (Ore. 1914). The principal case comes within the above exception. No return is necessary if the subject-matter is worthless. Harris v. Daley, 121 Ga. 511 (1904). The vendee must act within a reasonable time or he will be deemed to have accepted the goods. Manley v. Crescent Novelty Co., 103 Mo. App. 135

(1903); Collins v. Skillings, 112 N. E. 938 (Mass. 1916). They must be returned in a condition reasonable under the circumstances. Thompson v. Chambers, 13 Pa. Super. Ct. 213 (1900). The vendee must rescind the whole contract unequivocally and without reservation. Lowry v. Rosengrant, 71 So. 439 (Ala. 1916). The principal case seems to be based on the rule that the vendee may rescind where he does not receive all that the contract specified. McCormick Harvester Machine Co. v. Courtright, 54 Neb. 18 (1898); Rownd v. Hollenbeck, 108 N. W. 259 (Neb. 1906). As a general rule he must be able to place the vendor *in statu quo ante*. Case Threshing Machine Co. v. Lyons, 24 Ky. L. R. 1862 (1903).

SAVINGS BANKS—PAYMENT TO OTHER THAN DEPOSITOR—BY-LAWS—NEGLIGENCE—A pass book of a savings bank, containing the usual by-law for the protection of the bank in case payment be made to one holding the book, was presented together with a forged order, by one known by the bank to have acted previously as agent for the depositor and money was received thereon. *Held:* The bank was not liable to depositor for such payment. Commonwealth Bank v. Goodman, 97 Atl. 1005 (Md. 1916).

The general rule is that by-laws of savings banks providing that payments made to a holder of the book shall be binding on depositor are reasonable and necessary for the protection of the bank. Burill v. The Dollar Savings Bank, 92 Pa. 134 (1879); The Hough Ave. Savings & Banking Company v. Anderson, 78 Ohio St. 341 (1908). Knowledge of these by-laws, when copied in the pass book, will be charged to the depositor even though the latter be illiterate. Dolan v. Provident Institution for Savings, 127 Mass. 183 (1879). In such a case, however, a bank may be held to be negligent in not informing such a depositor of the presence of by-laws in the book. Siegel v. State Bank, 123 N. Y. S. 221 (1910).

Nevertheless, it has been held that such clauses do not relieve a savings bank of the duty of reasonable care and diligence to prevent payment to a wrong person. Dinini v. The Mechanics Savings Bank, 85 Conn. 225 (1912); Gearns v. Bowery Savings Bank, 135 N. Y. 557 (1892). Lack of such ordinary care on the part of the bank is generally held to be a question of fact for the jury. Chase v. Waterbury Savings Bank, 77 Conn. 295 (1904), and Hough Ave. Banking Company v. Anderson, *supra*. See however, Hankowska v. Buffalo Savings Bank, 155 N. Y. S. 694 (1913), where the court found as a matter of law from undisputed facts that the bank was negligent. The burden of proof is on the depositor to show negligence. Israel v. Bowery Savings Bank, 9 Daly 507 (N. Y. 1881).

The negligence of the depositor in not taking proper care of his pass book has often been urged by the bank as a defense in actions like the one in the principal case but the courts hold that such a fact is immaterial. "The question of contributory negligence is not involved," Brown v. Merrimack River Savings Bank, 67 N. H. 549, *etc.* (1893); Ladd v. Augusta Savings Bank, 96 Me. 510 (1902).

SPECIFIC PERFORMANCE—CONTRACTS—PUBLIC INTEREST—A bill for specific performance of a covenant to repair and maintain in repair was brought by a lessor, who was engaged in the business of furnishing electric light

and power to the city under a franchise, against the assignee of the lessee. *Held:* Specific performance was granted. Edison Illuminating Co. v. Eastern Pennsylvania Power Co., 98 Atl. 652 (1916).

It is a well settled rule that specific performance will not be granted of contracts, where the court would be obliged to supervise the performance for a long period of time. Powell Duffryn Steam Coal Co. v. Taff Vale R. R. Co., L. R. Ch. App. 331 (1874). Nor will a contract that requires some special skill, labor or service be specifically enforced. Clark v. Price, 2 Williams Ch. 157 (1819).

Where, however, the contract relates to the management and control of railroads or other agencies of transportation, which enjoy special privileges conferred by statute, ordinance, or franchise, specific performance thereof will generally be granted by courts of equity. See *dictum* in Standard Fashion Co. v. Siegel Cooper Co., 51 N. E. 408 (N. Y. 1898). Accordingly, contracts by a railroad to run its trains, Schmidtz v. L. & N. R. R., 101 Ky. 441 (1897); to make reasonable regulations to allow another railroad to run its trains on the covenantor's tracks and to maintain tracks and terminal facilities, Joy v. St. Louis, 138 U. S. 1 (Mo. 1890); to give tracking rights and make schedules, Union Pac. R. R. v. Chicago R. R., 163 U. S. 564 (1896); to maintain crossing frogs and provide signals and watchmen, L. & N. R. R. v. Illinois Cent. R. R., 174 Ill. 448 (1898); to erect neat and ornamental buildings, Columbus City v. R. R. Co., 25 Ohio C. C. R. 663 (1904); by a street car line to run horse cars, P. P. R. R. Co. v. Coney Island R. R. Co., 144 N. Y. 152 (1894), have been specifically enforced. Lone Star Salt Co. v. Texas Short Line R. R. Co., 99 Tex. 434 (1906), *contra*. In Patton v. Monongahela Street R. R. Co., 75 Atl. 589 (Pa. 1910), a contract to lay tracks and repair the street was specifically enforced, but in City of Pittsburgh v. Pittsburgh R. R. Co., 83 Atl. 67 (Pa. 1912), a contract to repair streets was held not enforceable.

The reason for the exception is the interest that the public has in the enforcement of railroads' contracts. L. & N. R. R. v. M. & T. R. R., 92 Tenn. 681 (1893). Therefore, where the public interest is not present, specific performance of railroad contracts is not granted. Murdfeldt v. N. Y. West Shore R. R., 102 N. Y. 703 (1886); Conger v. N. Y. West Shore R. R., 120 N. Y. 29 (1890).

A covenant to keep a flag station was specifically enforced with the limitation that if the interests of the public at any time demanded its removal that the covenantee be obliged to take damages in lieu of the performance. Parrott v. Atlantic & N. C. R. R., 81 S. E. 348 (N. C. 1914).

The exception has been generally confined to contracts by agencies for transportation, but in Franklin Tel. Co. v. Harrison, 145 U. S. 459 (Pa. 1892), a contract by a telegraph company to allow the use of its wire was enforced and in one case, Hubbard City v. Bounds, 95 S. W. 69 (Tex. 1906), a contract by an individual to supply and maintain a waterworks system was specifically enforced. Generally, a contract by an individual extending over a long period of time will not be enforced, no matter how great the public interest. See Kidd v. McGinnis, 1 N. D. 331 (1891); LaHogue District v. Watts, 179 Fed. 690 (Ill. 1910); Tim v. Van Meter Lumber Co., 51 So. 459 (Miss. 1910).

STATE HIGHWAYS—DUTY TO MAINTAIN COUNTY BRIDGES—MANDAMUS—A bridge constructed as a county bridge located on a highway taken over by the state under the Sproul Act of May 31, 1911, P. L. 468, was condemned by the county commissioners. *Held:* The duty of reconstruction devolved upon the county and could be enforced by mandamus. Commonwealth v. Bird, 98 Atl. 648 (Pa. 1916). This decision sets at rest two conflicting lower court decisions by overruling Fortney v. Centre County Commissioners, and following an unreported decision of the Blair County courts, referred to in the Centre County case.

In order to give county commissioners authority to build a bridge in the first instance the following elements must concur: (1) Report of viewers that bridge is necessary and too expensive for township; (2) Affirmative action on that report by court, grand jury and county commissioners; (3) Entry of record of bridge as a county bridge. Act of June 13, 1836, P. L. 551; Commonwealth v. Bowman, 218 Pa. 330 (1907). Where a public highway on one side of a bridge has been abandoned, the county is no longer obligated to keep up the bridge, Commonwealth v. Kessler, 222 Pa. 32 (1908); but a township is not bound to construct a bridge over a public road to take the place of a ford. Naugle v. Nescopeck Township, 225 Pa. 68 (Pa. 1909).

In New Jersey, by statute, the State Department of Public Roads is not authorized to repair bridges, P. L. 1912, p. 836, yet when the State Commissioner of Public Roads deems a bridge unsafe, unsuited or inadequate to the needs of the road or the traffic which it serves, or of such design or character as requires too frequent repairs, he may make written agreement to bear a part of the cost with the public body charged with such construction up to twenty *per centum* of the cost, P. L. 1913, p. 643. But where a public bridge exists over a navigable river not less than four thousand feet in length and connecting two municipalities in the state, one-third the cost of maintenance is borne by the state, P. L. 1912, p. 924. Where highway commissioners were empowered to construct necessary bridges on a trunk line road and branch roads to feed the same, the duty of building bridges on branch roads was upon the county. Patterson v. Commissioners of Swain County, 87 S. E. 317 (N. C. 1915). Where the duty to repair a bridge is absolute, it is well settled that mandamus will issue to compel the performance of that duty, State v. Board of Freeholders of Sussex, 76 N. J. L. 454, and thus when one county refused to join in repairing an inter-county bridge over a navigable river, it was compelled to join with the other county by mandamus. Douglas Co. Commissioners v. Leavenworth Co. Commissioners, 157 Pac. 1180 (Kans. 1916). It follows that, where there is a liability on behalf of an adjoining county for maintenance of an inter-county bridge, the county assuming the burden may recover one-half the cost of repairing the structure, Peya Kaha Co. v. Brown County, 156 N. W. 507 (Neb. 1916). At common law, any person authorized to interfere with a lawful highway by cutting through same, must build and maintain a bridge over the gap until such time as he restores the highway to its original condition. Hertfordshire Council v. New River Co., 2 Ch. 513 (Eng. 1904); City of Indianapolis v. Indianapolis Water Co. (Ind. 1916).

SUNDAY—WORKS OF NECESSITY—OPERATION OF A BARBER SHOP—Barbering comes within a statute prohibiting "any work or business," or anyone "found at a trade or calling" from pursuing it on Sunday, and is not within "works of necessity or charity" which are excepted. Gray v. Commonwealth, 188 S. W. 354 (Ky. 1916).

It was no offense at common law to work at a trade on Sunday, Rex v. Brotherton, 1 Strange 702 (Eng. 1719); or to labor, State v. Williams, 4 Ired. 400 (N. C. 1843); or to keep shop and sell goods, State v. Brooksbank, 6 Ired. 73 (N. C. 1845). At present the great majority of jurisdictions, following the English statute of 29 Charles II, have general Sunday laws and many prohibit barbering on Sunday by special enactment. As in the principal case, barbering is generally held to come within the terms of a general Sunday law. Commonwealth v. Waldman, 140 Pa. 89 (1891). This is held whether the statute prohibits keeping open a shop and doing business therein, Commonwealth v. Dextra, 143 Mass. 28 (1886); or laboring therein, State v. Frederick, 45 Ark. 347 (1885). And the court will take judicial notice of the fact that barbering is laboring. State v. Nesbit, 8 Kans. App. 104 (1898). It has been held that a barber is a "workman" within such a statute. Regina v. Taylor, 19 Can. Law Journal, N. S., 362 (1883). But he has not been held within the terms "tradesman, artificer, workman, labourer, or other person whatsoever." Palmer v. Snow, L. R. [1900] 1 Q. B. D. 723 (Eng. 1900). Barber shop is not a "shop . . . or place of business . . . for the purpose of trade or sale of goods, wares, and merchandise." State v. Krech, 10 Wash. 166 (1894).

A statute prohibiting barbering on Sunday is constitutional. Petit v. Minnesota, 177 U. S. 164 (1899); Stanfeal v. State, 3 Ohio St. 24 (1908). It is within the state's police power. People v. Havnor, 149 N. Y. 195 (1896); State v. Petit, 74 Minn. 376 (1898). *Contra, ex parte* Jentzsch, 112 Cal. 468 (1896). It subserves to the promotion of the general welfare. McClelland v. Denver, 36 Colo. 486 (1906); *Ex parte* Kennedy, 42 Tex. Cr. App. 148 (1900). *Contra,* Eden v. People, 161 Ill. 296 (1896). It does not unduly restrain personal liberty, State v. Sopher, 25 Utah 318 (1902). It is not special legislation, *Ex parte* Northrup, 41 Ore. 489 (1902); nor class legislation, People v. Bellet, 99 Mich. 151 (1894); nor is it discriminatory, Stark v. Backus, 140 Wis. 557 (1902). *Contra,* Bartlett, J., dissenting, in People v. Havnor, *supra.* This rule applies where the violators are persons, as Seventh Day Adventists, who duly observe another day as Sabbath. State v. Bergfeldt, 41 Wash. 234 (1905), overruling Tacoma v. Krech, 15 Wash. 296 (1896). But some statutes, as that of the principal case, except such persons from the provisions of the statute. It seems that a special law applying to barbers where there is a general Sunday law is unconstitutional. State v. Graneman, 132 Mo. 326 (1896); Stratman v. Commonwealth, 137 Ky. 500 (1910). *Contra,* Briger v. State, 102 Tenn. 103 (1898). One barber cannot restrain a competitor from violating the Sunday law for no property rights are invaded. York v. Ysagname, 31 Tex. Civ. App. 26 (1902). Though barbering on Sunday is a violation of the statute, it is not an indictable nuisance. State v. Lorry, 7 Baxter 95 (Tenn. 1874).

As was held in the principal case, barbering is not a work of necessity

to come within the exception to a general Sunday statute. Phillips v. Innes, 4 Cl. & F. 234 (Eng. 1837); Commonwealth v. Waldman, *supra*. *Contra*, Bartlett, J., dissenting in People v. Havnor, *supra*. The court may take judicial notice that barbering is not a necessity, State v. Frederick, 45 Ark. 347 (1885), or make it solely a question of fact for the jury. Ungericht v. State, 119 Ind. 379 (1889); Sparth v. State, 10 Ohio Dec., Reprints, 639 (1889).

It seems that the question depends largely on the circumstances of the particular case. Commonwealth v. Williams, 1 Pearson 61 (Pa. 1853); Stone v. Graves, 145 Mass. 353 (1887). It is no defense to show that the patrons were travelers at a large city, State v. Schatt, 128 Mo. App. 622 (1907), or that they were members of a club and at the club house. McCain v. State, 2 Ga. App. 389 (1907). The fact that it is very convenient or a matter of personal cleanliness for the patrons to have the work done does not make it a necessity. Phillips v. Innes, and McCain v. State, *supra*. But the statutes does not prevent a man from shaving himself or having a servant do it. State v. Petit, and State v. Sopher, *supra*.

TORTS—CONTRIBUTORY NEGLIGENCE OF CHAUFFEUR NOT IMPUTED TO OWNER'S GUEST—The contributory negligence of the chauffeur cannot be imputed to one traveling in the vehicle by invitation from the owner to prevent recovery by the passenger against the negligent third party. St. Louis & Santa Fe R. R. Co. v. Bell, 159 Pac. 336 (Okla. 1916).

The rule that the occupant of a vehicle will be imputed with the negligence of the driver is based upon the theory of the nearness of identity between the passenger and the vehicle, as explained in the leading case of Thorgood v. Bryan, 8 C. B. 115 (1849). This is followed in a few states. Carlisle v. Sheldon, 38 Vt. 440 (1866); Lawson v. Fond du Lac, 141 Wis. 57 (1909); Lake v. Springville, 153 N. W. 690 (Mich. 1915); and in Payne v. R. R. Co., 39 Ia. 525 (1874), though on the ground that the person injured must rely on the driver's diligence for recovery, and the negligence of the driver defeats the right to recover. But this doctrine has been repudiated in England, The Bernina, L. R. 12 Probate Div. 58 (1887), and is generally disapproved in this country. Little v. Hackett, 116 U. S. 366 (1886); Dean v. Pa. R. R. Co., 129 Pa. 514 (1889). The negligence of the driver was not imputed to the guest who had suggested the trip, Reading Twp. v. Telfer, 57 Kan. 798 (1897), nor to one having authority to indicate the route, Little v. Hackett, *supra;* nor to the wife of the driver, Knoxville Light Co. v. Vangilder, 178 S. W. 1117 (Tenn. 1915). For a *contra* wife case, see Carlisle v. Sheldon, *supra*. To render one liable on the ground of imputed negligence, the relation either of master and servant or principal and agent must exist, or the parties must be engaged in a joint enterprise, in which there is a community of interests in the object or the purposes of the undertaking and the right to govern the conduct of the other. A member of partnership has been held liable for the negligent driving of his partner with whom he was riding on an errand for firm's business. Van Horn v. Simpson, 153 N. W. 883 (S. Dak. 1915). The rule that the negligence of the driver will not be imputed to the passenger does not apply where the

passenger has full knowledge of the danger and voluntarily incurs the risk, Robeillard v. Rwy. Co., 216 Fed. 503 (1914), nor where he was contributorily negligent in not exercising diligence to avoid the accident, Dean v. Pa. R. R. Co., *supra*, even though the plaintiff had no control over the driver. Rwy. Co. v. Bussey, 71 Pac. 261 (Kan. 1903).

WILLS—WHAT CONSTITUTES—The testator left an unsigned letter addressed to his executor containing directions and explanations, and referring to "my will made." The letter and will were attached by clamps and in a sealed envelope indorsed by the testator as his last will and testament. *Held:* The letter formed no part of the will. *In re* Keith's Est., 159 Pac. R. 705 (Cal. 1916).

Several papers together may constitute the last will of the testator. Jones v. Habeisham, 63 Ga. 146 (1876). Nor need they be physically connected if the sense is continuous and clear throughout. Appeal of Wykoff, 15 Pa. 281 (1850); Martin v. Exec., 4 Strob. 188 (S. C. 1860). Even if written at different times, if the one of later date contains no revocatory clause, all will be probated. Whitney v. Hennington, 85 Pac. 84 (Col. 1906). But the *animus testandi* must be present and the paper expressive of the maker's intent respecting the posthumous destination of his property. Stein v. North, 3 Yeates 324 (Pa. 1802); Whyte v. Pollok, 7 App. Cases 100 (Eng. 1882). It has been held that a letter merely referring to a previously made will is not testamentary and entitled to probate. *In re* Baer's Estate, 11 D. R. 471 (Pa. 1902). Nor does the fact that the writing is on the same sheet as the will make it so. Conboy v. Jennings, 1 Thompson and C. 622 (N. Y. 1873). In Pennsylvania the courts have gone far in admitting documents to probate. Each case, it has been held, is dependent on the language of the paper offered as expressive of the intent of the author, and precedent rarely affords much aid. Gaston's Estate, 188 Pa. 374 (1898). Enclosing unsigned dispositive papers in an indorsed envelope constitutes the whole a will. Fosselman v. Elder, 98 Pa. 159 (1881); Harrison's Estate, 196 Pa. 576 (1900). But an address on a box "to my attorney when I die" does not constitute it, and all within, part of a formally prepared will. *In re* Jacoby's Estate, 190 Pa. St. 382 (1899). Nor is an unsigned memorandum to the legatee expressing certain desires of the testator part of a duly endorsed will on the previous page. Bowlby v. Thunder, 105 Pa. 173 (1884).